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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE DAMIAN RODRIGUEZ,

Defendant and Appellant.

D074633

(Super. Ct. No. SCD273615)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

Pursuant to a negotiated plea agreement, Jorge Damian Rodriguez pleaded guilty to one count of voluntary manslaughter (Pen. Code, § 192, subd. (a))¹ as a lesser included offense of murder (§ 187). The plea agreement granted the trial court discretion to select a sentence of either the mid-term of six years or the upper term of 11 years. The court selected the upper term and sentenced Rodriguez to 11 years in prison.

Rodriguez appeals. His court-appointed appellate counsel has filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), which raised no issues and requested we independently review the record to determine if the trial court committed any error. We granted Rodriguez the opportunity to file a supplemental brief on his own behalf and he has not responded. We have independently reviewed the record under *Wende* and have found no reasonably arguable issues for reversal on appeal. Therefore, we affirm.

II

BACKGROUND

According to the evidence presented at the preliminary hearing, Rodriguez was sitting on the outdoor steps of his residence with a female companion drinking alcohol. Rodriguez crossed the street to a transient camp where two homeless individuals were engaged in a verbal altercation. Rodriguez told the two homeless individuals to "shut up" because they were being too loud and there were children sleeping in the area. Rodriguez

¹ All further statutory references are to the Penal Code.

then punched one of the two homeless individuals. The victim collapsed, hit the back of his head on the paved ground, and fell into unconsciousness. Rodriguez rifled through the victim's pockets, took his wallet, and dragged his unconscious body to the street curb. A short time later, the victim passed away from blunt force head trauma.

The district attorney charged Rodriguez by information with one count of murder. However, under a negotiated plea agreement with the district attorney, Rodriguez pleaded guilty to voluntary manslaughter as a lesser included offense of murder. The plea agreement granted the trial court discretion to select a sentence of either the mid-term of six years or the upper term of 11 years. It also included a waiver of Rodriguez's appeal rights, which stated as follows: "I give up my right to appeal the following: 1) denial of my [Penal Code section] 1538.5 motion, 2) issues related to strike priors (under [Penal Code] sections 667(b)-(i) and 1170.12), and 3) any sentence stipulated herein."

At the plea hearing, the trial court engaged in the following colloquy with Rodriguez regarding the maximum possible sentence under the plea agreement: "THE COURT: So my understanding of your arrangement with the District Attorney's office is in exchange for your ability to plea[d] guilty to the lesser-included offense . . . you are going to stipulate -- in other words, you're going to agree you are going to go to state prison as a consequence of this plea, and the sentence will either be 6 years or 11 years. It won't be less than 6. It won't be more than 11. It will either be 6 or 11 years. I get to decide what number that is. [¶] Is that your understanding? THE DEFENDANT: Yes, your Honor." Further, the court inquired as follows: "THE COURT: You understand that your exposure in the case, based on the plea, is 11 years in state prison and

potentially up to four years on parole. [¶] Do you understand? THE DEFENDANT: Yes." At the conclusion of the hearing, the court accepted the plea agreement.

The trial court sentenced Rodriguez to the upper term of 11 years in prison. As the basis for its sentencing determination, the court relied on both the vulnerability of the victim, who was a member of the homeless population, and the callousness of Rodriguez's conduct. Rodriguez appeals.

III

DISCUSSION

Appointed appellate counsel filed a brief summarizing the facts and proceedings below. Counsel presented no argument for reversal and instead requested we independently review the record for error as mandated by *Wende, supra*, 25 Cal.3d at pp. 441-442. To aid our review, and consistent with *Anders v. California* (1967) 386 U.S. 738, 744, counsel identified three possible appellate issues (*Anders* issues):

(1) whether the appeal waiver contained in the negotiated plea agreement encompasses the trial court's exercise of discretion in selecting between the mid-term and the upper term; (2) whether a certificate of probable cause is required to "raise an issue regarding the scope of the appeal waiver"; and (3) whether the trial court abused its discretion in selecting the upper term in sentencing Rodriguez.

We conducted an independent review of the record, including considering the *Anders* issues identified by appointed appellate counsel. Our review did not disclose any reasonably arguable appellate issues. Rodriguez has been competently represented by counsel in this appeal.

IV

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

AARON, J.